Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1271

ROBERT O. POLLEY,
Petitioner,

vs.

WILBURN E. KIRKLAND, W. C. LONG, COY L. EMERET, GERALD PETTY, DONALD W. HUDSON, GARRY HARRIS and CONRAD ROBINSON, Individually and as Members of the Board of Trustees of the La Vega Independent School District, ROBERT W. CASTER, Individually and as Superintendent of the La Vega Independent School District, M. L. BROCKETTE, Individually and as Commissioner of the Board of Education of the State of Texas and THE STATE BOARD OF EDUCATION OF THE STATE OF TEXAS,
Respondents

APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER, ROBERT O. POLLEY

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Respondents

_____

APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER, ROBERT O. POLLEY

This is the petition for writ of certiorari of Robert O. Polley. Respondents are Wilburn E. Kirkland, W. C. Long, Coy L. Emeret, Gerald Petty, Donald W.

Hudson, Garry Harris and Conrad Robinson, Individually and as Members of the Board of Trustees of the La Vega Independent School District, Robert W. Caster, Individually and as Superintendent of the La Vega Independent School District, M. L. Brockette, Individually and as Commissioner of the Board of Education of the State of Texas and The State Board of Education of the State of Texas.

(a) The United States District Court, Western District of Texas, Austin Division, Roberts, J., rendered a Memorandum Opinion and Order on Motions for Summary Judgment on December 13, 1977. A copy of this opinion is appended. This judgment was appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the Court below on December 6, 1979. A copy of this Local Rule 21 decision is appended.

(b) The ground on which the jurisdiction of this Court is invoked is as follows:

Petitioner was employed as Principal of East La Vega Elementary School by the La Vega Independent School District. The School Superintendent and the Board of Trustees removed him from this position and demoted him to the position of classroom teacher at considerably lower pay and without administrative responsibilities. On appeal, the Commissioner of the Board of Education of the State of Texas and the State Board of Education upheld the School Board's action. This demotion deprived Petitioner of property rights secured by the Fourteenth Amendment without due process of law as the School Board's action was not supported by substantial evidence. Petitioner brought this suit under the Civil Rights Act of 1871, 42

U.S.C. Sec. 1983, and the Due Process Clause of the Fourteenth Amendment. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. Sec. 1343(3) and (4) and the federal question provision, 28 U.S.C. Sec. 1331. The date of the action of the United States Court of Appeals for the Fifth Circuit in affirming the decision of the Court below was December 6, 1979.

(c) The question presented for review is:

Did the District Court err in granting summary judgment for the Respondents on the basis that, as a matter of law, no cause of action upon which relief may be granted is stated under the due process clause of the Fourteenth Amendment to the Constitution of the United States and under the "federal question" provision, 28 U.S.C. Sec. 1331, under the facts of

this case which compel doubt as to the fairness and credibility of the hearing before the School District Board of Trustees, and, whether the ruling of this Court in *Bishop v. Wood*, 426 U.S. 341 (1976), under factual situations such as exist in this case, as set forth in the District Court's opinion and order, should be overturned or limited.

(d) The constitutional provisions and statutes which this case involves are:

(i) Amendment XIV, Sec. 1 of the Constitution of the United States;

(ii) The Civil Rights Act of 1871, Act of April 20, 1871, c. 22, Sec. 1, 17 Stat. 13, Title 42, U.S.C., Sec. 1983;

(iii) Title 28, U.S.C., Sec. 1343 (3) and (4);

(iv) Title 28, U.S.C., Sec. 1331.

(e) The following are the material facts of the case:

Petitioner has been employed by Respondent School District for over twenty years as a teacher or administrator. In 1972 he was appointed Principal of East La Vega Elementary School and served in that position until 1975 when he was removed as Principal and returned to a classroom teaching position. On February 19, 1975, Superintendent Caster of Respondent School District wrote Petitioner a letter informing him that the Board of Trustees on the previous day had met and "re-elected administrative personnel... for the 1975-76 school year or the appropriate time period, subject to re-assignment by the Superintendent of Schools." This same letter was sent to all school principals who were being rehired for the following school year and a different letter was sent to teachers. Petitioner, therefore, assumed that his contract as Principal was

being renewed. Later Petitioner was advised by Superintendent Caster that he was being "re-assigned" for the year 1975-76 to a classroom teaching position and relieved of his duties as principal, which Petitioner viewed as a demotion rather than a "re-assignment." Petitioner's protests included an April 8, 1975, appearance before the Board of Trustees requesting reasons for the change in his position. Upon recommendation of Respondent School District's attorney no explanation or reasons were given. Petitioner then retained counsel and, on May 9, 1975, in writing, requested a clarification of his status and asked for a public hearing on his proposed demotion. On May 27, 1975, Respondent School District's attorney wrote a letter to Petitioner's counsel setting a hearing for June 3rd and, for the first time, stated reasons for the demotion. At

the hearing before the Board of Trustees both Respondent School District and Petitioner presented evidence, including witnesses, exhibits and the testimony of Petitioner himself, and, at the conclusion of the hearing, the Board of Trustees met in closed session and unanimously voted to uphold the decision to demote Petitioner from principal to a classroom teaching position. Petitioner appealed through proper administrative channels and a hearing before Respondent Commissioner of Education was held on September 9, 1975. Respondent Commissioner of Education denied the appeal on December 29, 1975, and this decision was affirmed by Respondent Texas State Board of Education on February 13, 1976. Suit was filed by Petitioner in the United States District Court, Western District of Texas, Austin Division, on March 12, 1976, and the case

was submitted for decision on Motions For Summary Judgment by both Petitioner and Respondents, based upon the transcripts of the hearings before the Board of Trustees of Respondent School District and Respondent Commissioner of Education.

On December 13, 1977, the District Court considered the Motions for Summary Judgment of both Petitioner and Respondents and denied Petitioner's motion and granted Respondent School District's motion on the grounds that the transcripts of the hearings before the Board of Trustees of Respondent School District and Respondent Commissioner of Education contained substantial evidence to support the decision of Respondent School District to demote Petitioner. The Court, in its final judgment of December 13, 1977, reviewed the alleged reasons for the demotion of Petitioner and found the evidence "far from

strongly convincing" and, in fact, found that some of the evidence appeared to be "manufactured after the fact to bolster the allegations against Polley," which "casts doubt on the credibility of the entire proceeding." Since this is the very heart of Petitioner's contention that the factual situation of this case, as well as any similar case, necessitates the overturning or limiting of the application of the decision of this Court in *Bishop v. Wood*, 426 U.S. 341 (1976), a portion of the District Court's Opinion of December 13, 1977, is quoted here to demonstrate that the Court obviously shares Petitioner's opinion that the hearing before the Board of Trustees of Respondent School District was patently farcical and unfair:

> "Several grounds for the removal from his position as principal were given to Polley prior to the hearing. The Court notes, in passing, that several of them concern matters which did not arise until after the

February meeting at which the Board admittedly voted to demote Polley. The grounds included: (1) dissatisfaction with Polley's handling of a gift of playground equipment to East La Vega Elementary School by the local Parent-Teacher Organization (PTO); (2) Polley's unilateral action in promoting the installation of glass doors at the school; (3) attendance problems with regard to the scheduling of speech therapy classes at the school; (4) failure to fill out and return a grant application for Title III funds; (5) excessive class loads in Title I remedial reading classes; and (6) failure to attend a principals' workshop.

> "Without reviewing the testimony and exhibits in detail, the Court notes that the evidence of Polley's shortcomings with regard to each of the above charges is far from strongly convincing. The record shows Polley was widely liked and respected both as a teacher and an administrator, and in fact was rehired by the School District as a teacher. The testimony at the Board hearing indicates that the dissatisfaction with his performance as principal stemmed primarily from the Superintendent's disagreement with Polley over the construction priorities and scheduling system at the elementary school. Mr. Polley's testimony credibly refutes the allegations that he was deficient in remedying the speech therapy attendance problems; exhibits show that the teacher failed to keep attendance records on the forms

furnished her, and no such records were shown to Polley to apprise him of any problem. His testimony also tends to show that he followed the effective guidelines relative to class size limits in the remedial reading program.

"With regard to the principal's workshop, the only testimony as to the content indicates that it was more recreational than substantive, though Polley admitted that he did not follow the Superintendent's suggestion that he attend.

"The Court feels compelled to make further comment on the charge that Polley was late in furnishing the application for Title III funds. There was testimony from Superintendent Caster and his Assistant, O. P. Adams, that Polley failed to perform the assignment he was given to make the initial application for funds for a bilingual program. In support of their testimony, they introduced Respondents' Exhibit No. 6, which is a letter purportedly written to Caster by Adams on January 20, 1975, detailing the problems in obtaining Polley's application. The conclusion is almost inescapable, however, that the letter was written neither by Adams nor on January 20. The text of the letter refers several times to 'Mr. Adams' in the third person, and refers specifically to January 20 in the past tense as 'that date.' Although the Court is hesitant to attribute conspiratorial motives to the parties involved, it certainly would appear

to a reasonable reader that the letter was manufactured after the fact to bolster the allegations against Polley, and it is this Court's view that such evidence casts doubt on the credibility of the entire proceeding."

The Court, in granting Respondent School District's Motion for Summary Judgment, found that it could not "conclude that the allegations and testimony against Polley were so wholly lacking in substance as to render the Board's action *completely arbitrary*" (emphasis added) and based its decision on the admonition in *Bishop v. Wood*, supra, that:

" 'We must accept the hard fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.' "

The United States Court of Appeals for the Fifth Circuit, on December 6, 1979, affirmed the District Court's judgment by Local Rule 21 Decision.

(f) Petitioner's argument, amplifying his reasons relied on for allowance of the writ, is as follows:

A reading of the District Court's judgment of December 13, 1977, compels the conclusion that the Court agrees with Petitioner's contention that the evidence against him adduced at the hearing before the Board of Trustees of Respondent School District was manufactured, trivial and of doubtful credibility. A reading of the transcript of that hearing will bear out the District Court's conclusions regarding the evidence and, overwhelmingly, enforces the opinion that Superintendent Caster, on February 19, 1975, hired Petitioner for an additional two year period

as Principal, subsequently decided to demote him to classroom teacher, and, when Petitioner protested, proceeded to manufacture evidence to use against him at the hearing before the Board of Trustees. Superintendent Caster and the Board of Trustees refused to give any reasons or explanation for the demotion until Petitioner retained counsel and requested a hearing, which was granted and held on June 3, 1975. In fact, Petitioner was told there were no complaints against him. The conclusion is inescapable that the Board of Trustees had already made the decision to demote Petitioner at the regular Board meeting in February, 1975, and had, in fact, hired Petitioner's replacement as principal at the time of the June 3, 1975, hearing. The trumped-up nature of the evidence against Petitioner is evident when the transcript of the hearing

is considered as a whole and the cavalier attitude of Respondent School District toward truth and honesty is apparent when the issuance of its 1967 Handbook to all personnel is considered. That Handbook states that Respondent School District's policy for employment is one of a "continuing contract" but, in fact, Respondent School District now contends that it never had any intention to grant personnel a "continuing contract" as such term is normally understood by members of the teaching profession and as defined under the provisions of the Texas Education Code.

As the District Court in its Judgment of December 13, 1977, observed, by letter of February 19, 1975, Superintendent Caster told Polley that he *had been* re-hired which, in a very similar case, *Stapp v. Avoyelles Parish School Board*, 1977, 545 F. 2d 527, created a non-subjective

expectancy of re-employment which established a property interest sufficient for Due Process requirements. Since Polley has a property interest sufficient to invoke the Due Process requirements of the United States Constitution, to hold that there is no necessity to require a fair forum to guard against arbitrary, capricious and unreasonable actions on the part of the administrative agency conducting the hearing is to create a right without substance. Mr. Justice Douglas, in his dissenting opinion in *Board of Regents v. Roth*, 1972, 408 U.S. 564, 92 S. Ct. 2701, 2712, 33 L. Ed. 2d 548, observed that the protection of the individual against arbitrary action is the very essence of due process and that the only check against the possibility of such arbitrary action is to prevent secret actions behind closed doors without notice to affected persons.

The evidence is compelling that this is exactly what happened in February of 1975 in the case at bar.

In *Roth*, supra, Mr. Justice Marshall, also dissenting, stated that prior decisions of the United States Supreme Court

> "...establish a principle that is as obvious as it is compelling—*i. e.*, federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control.... The government may only act fairly and reasonably.
>
> "This Court has long maintained that 'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.' "

Mr. Justice Marshall, in his dissent, continued:

> "...when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and

> protected against arbitrary government action.
>
> "Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action."

In the case at bar, it becomes readily apparent that the District Court had a fundamental question concerning the fairness of the hearing before Respondent School District's Board of Trustees and the credibility of the evidence introduced at that hearing against Petitioner. It thus becomes evident that blind adherence to the rule quoted by the District Court from *Bishop v. Wood*, 1976, 426 U.S. 341, 96 S. Ct. 2074, 2080, 48 L. Ed. 2d 684, would allow an unfair hearing in cases

such as the one at bar. This subjects public employees to unbridled capriciousness, unreasonableness and arbitrariness by governmental agencies and effectively destroys the guarantees of the United States Constitution's Due Process provisions.

In *Bishop v. Wood*, supra, Mr. Justice Brennan, in his dissent, in which Mr. Justice Marshall concurred, after stating that

> " 'It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undetermined.' "

continued:

> "These observations do not, of course, suggest that a 'federal court is...the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.' *Ante*, at 2080. However, the federal courts *are* the appropriate forum for ensuring that the constitutional mandates of due process are followed by those

> agencies of government making personnel decisions that pervasively influence the lives of those affected thereby; the fundamental premise of the Due Process Clause is that those procedural safeguards will help the government avoid the 'harsh fact' of 'incorrect or ill-advised personnel decisions.' *Ante*, at 2080. Petitioner seeks no more than that, and I believe that his 'property' interest in continued employment and his 'liberty' interest in his good name and reputation dictate that he be accorded procedural safeguards before those interests are deprived by arbitrary or capricious government action."

Also dissenting in *Bishop v. Wood*, supra, Mr. Justice White, joined by Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun, stated:

> "The views now expressed by the majority are thus squarely contrary to the views expressed by a majority of the Justices in *Arnett*. As Mr. Justice Powell suggested in *Arnett*, they are also 'incompatible with the principles laid down in *Roth* and *Sindermann*.' 416 U.S. at 166, 94 S. Ct. at 1650. I would not so soon depart from these cases nor from the views expressed by a majority in *Arnett*. The ordinance plainly grants petitioner a right to his job unless there is cause to fire him. Having

> granted him such a right it is the Federal Constitution, not state law, which determines the process to be applied in connection with any state decision to deprive him of it."

If, under the facts in this case, the majority decision in *Bishop v. Wood*, 426 U.S. 341 (1976), is to be followed without deviation, it appears that public employees, including members of the teaching profession, are afforded no protection whatsoever from arbitrary, capricious and dishonest decisions of administrative boards.

The District Court, in applying the substantial evidence rule in this case, seems to imply that a scintilla or smidgen of evidence is synonymous with substantial evidence. If this is so, then this oppressive rule should be modified or limited in cases of this kind so that local self-government will not perish under the weight of tyranny which always

develops when officials have such unbridled power and all effective restraints or review of their actions are removed when procedural due process becomes a mockery.

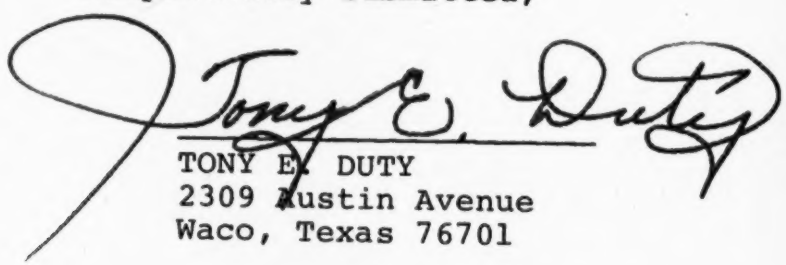
The case at bar provides an excellent vehicle to correct the pitfalls inherent in the majority decision in *Bishop v. Wood*, supra, in cases where the evidence is unconvincing, weak and contrived. If such an opportunity to promote fundamental fairness in such cases is allowed to pass, it will encourage governmental bodies, in conducting administrative hearings, to allow falsified, manufactured and erroneous evidence in support of their preconceived decisions, thereby allowing arbitrary, capricious and unreasonable actions against public employees, including members of the teaching profession, and assuring the members of such governmental

bodies that the Due Process provisions of the United States Constitution amount to nothing more than a procedural formality affording no protection to the objects of the governmental bodies' displeasure. While it is acknowledged that school boards should be allowed to operate their facilities, they should not be allowed to do so with the knowledge that they are completely unfettered in their actions and that their acts of capriciousness can know no bounds so long as the formal procedures of Due Process are followed. Hearings conducted without regard for honesty and fairness cannot fail to encourage perjury and deceit. Such unfettered power of administrative boards can result only in utter confusion and the degradation of public employees working for public institutions employing such tactics.

For these reasons certiorari should

be granted. The judgment of the United States District Court, Western District of Texas, Austin Division, affirmed by the United States Court of Appeals for the Fifth Circuit, should be reversed. The relief sought by Petitioner in the District Court should be granted.

Respectfully submitted,



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APPENDIX

APPENDIX A

MEMORANDUM OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT OF THE
UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ROBERT O. POLLEY	*	
	*	CIVIL ACTION
V.	*	
	*	NO. A-76-CA-46
WILBURN E.	*	
KIRKLAND, ET AL.	*	

MEMORANDUM OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

Came on this day for consideration by the Court cross-motions for summary judgment by Plaintiff, a former elementary school principal, and Defendants, the superintendent and Board of Trustees of the school district. To the extent necessary in this review of state administrative action, this opinion shall constitute

the Court's findings of fact and conclusions of law.

This is a suit by Robert Polley, a fifth-grade school teacher in the LaVega Independent School District in Waco, Texas, challenging the action of the School District Superintendent and Board of Trustees in removing him from the position of principal of East LaVega Elementary School and demoting him to the position of classroom teacher at considerably lower pay and without administrative responsibilities. Also listed as Defendants are the Commissioner of the Board of Education of the State of Texas and the State Board of Education, who upheld the School Board's action on appeal.

Plaintiff brings this suit under the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Due Process Clause of the Fourteenth Amendment. He alleges that his

demotion from principal to teacher deprived him of property rights secured by the Fourteenth Amendment without due process of law, and that the Board's action was unsupported by substantial evidence. Plaintiff has alleged jurisdiction under 28 U.S.C. §§1343(3) and (4) and 28 U.S.C. §1331. He seeks reinstatement as principal with equitable relief of back pay from the time of his demotion, together with costs and attorney's fees from the Defendants.

The record shows that Robert Polley has been employed by the LaVega Independent School District for over twenty years in either a teaching or administrative capacity. In 1972 he was appointed principal of East LaVega Elementary School, and served in that position until his removal in 1975. On February 19, 1975, Robert Caster, the Superintendent of the School District, wrote Polley a letter

informing him that at a meeting on the previous day the Board of Trustees had "re-elected administrative personnel... for the 1975-76 school year, subject to re-assignment by the Superintendent of Schools." This same letter was sent to all school principals who were being re-hired for the following school year; a somewhat different letter was sent to the school district teachers. Thus, Polley assumed that his contract as principal was being renewed.

Some time thereafter Caster advised Polley that he would not be continued as principal, but would instead be "re-assigned" to a classroom teaching position for 1975-76. Viewing such change not as a mere re-assignment to a new location, but rather as a demotion in status within the School District hierarchy, Polley protested. On April 8, 1975, he appeared

before the Board of Trustees and requested the reasons for the change in position. At that time, he was given no explanation, apparently on the recommendation of the School District's attorney. As a result, Polley retained an attorney, and on May 9, made a written request for clarification of his status and for a public hearing on his proposed demotion. On May 27, he received a letter from counsel for the School District, setting a hearing for June 3 and, for the first time, stating reasons for the Superintendent's action.

At the hearing before the Board of Trustees, the School District counsel called several witnesses to substantiate the allegations against Polley. Polley was represented by counsel at the hearing, and was permitted to cross-examine witnesses, to testify himself, and to call witnesses on his own behalf to refute the

charges. At the conclusion of the hearing the Board met in closed session and voted unanimously to uphold the decision to demote Polley from principal to a teaching position.

Polley appealed the decision through proper administrative channels. On September 9, 1975, he was given a hearing before the Commissioner of Education, who denied the appeal on December 29, 1975. On February 13, 1976, the Texas State Board of Education affirmed the Commissioner's ruling.

The present suit was filed March 12, 1976, and the transcripts of the Board hearing and the Commissioner's hearing have been submitted for the Court's consideration. By their respective motions for summary judgment, the parties agree that the central issue for this Court's determination is whether the action of the

Board of Trustees in demoting Plaintiff and reducing his salary was supported by substantial evidence.

Before reaching that question, the Court is constrained to consider several preliminary matters. First, the Court on its own motion notes the jurisdictional problem arising in this type of case as a result of the Fifth Circuit's decision in Muzquiz v. City of San Antonio, 528 F. 2d 499 (5th Cir. 1976). That holding precludes the use of §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, as a basis for a suit against a school board. Since Plaintiff presents no claim for damages against the LaVega school officials in other than their official capacities, the Court is of the opinion that Muzquiz is a bar to relief under §1983 in the circumstances of this case. However, Plaintiff also has alleged a cause of

action arising under the Constitution of the United States, and asserts jurisdiction under the "federal question" provision, 28 U.S.C. §1331. In similar situations the Fifth Circuit has upheld jurisdiction over school districts on that basis, and the Court is confident that §1331 presents an adequate jurisdictional foundation for the present case. See Stapp v. Avoyelles Parish School Board, 545 F.2d 527, 531, n. 7, for further discussion on this jurisdictional question.

Second, Defendants contend that Plaintiff Polley has demonstrated no deprivation of an interest in "life, liberty, or property" which is cognizable under the Due Process Clause. Whether a constitutionally-protected property interest exists is determined by reference to state law. Bishop v. Wood, 426 U.S. 341 (1976); Siler v. Brady Independent

School District, 553 F.2d 385 (5th Cir. 1977). In this case, the Commissioner of Education found, and the record adequately supports the finding, that the LaVega Independent School District had not adopted the statutory "continuing contract" method of tenure which would have entitled Polley to the procedural protections set forth in Chapter 13, Subchapter C, of the Texas Education Code (1972). While Plaintiff correctly points out that the 1967 Handbook issued to the School District personnel states that the School District policy for employment is one of a "continuing contract", no reference is made therein to the Texas Education Code, nor do the School District's employment contracts embody the terms and conditions of Subchapter C, as required by Chapter 13, §13.101, of the Code.

The failure to adopt the optional

"continuing contract" method of tenure does not necessarily mean that Polley had no constitutionally-protected property interest in his expectation of continued employment as principal. Polley was working under a two-year term contract which was due to expire in August, 1975, and had the School District made no representation that he would be retained as principal after that date, he would have had only a subjective expectancy of continued employment in that capacity. As a non-tenured employee, he would not then have been entitled to due process protection from demotion at the expiration of his term contract. Bishop v. Wood, supra. But Superintendent Caster's letter of February 19, 1975, created a non-subjective expectancy of continued employment as principal. Along with the other principals in the School District, Polley was informed that

the Board of Trustees had "re-elected" the administrative personnel for the 1975-76 school year. The letter to Polley is remarkably similar to the notice received by the school principal in Stapp v. Avoyelles Parish School Board, supra, in which the Fifth Circuit held that a non-subjective expectancy was thereby created, consequently establishing a property interest sufficient for Due Process requirements. Polley's letter of renewal also clearly distinguishes Polley's situation from that of the teachers in Siler v. Brady Independent School District, supra, and Hix v. Tuloso-Midway Independent School District, 489 S.W.2d 706 (Tex.Civ. App.--1972, writ ref'd n.r.e.), where the only basis for the assertion of de facto tenure was a vaguely-stated policy by the respective school districts to rehire teachers whose work was satisfactory. In

this case, Robert Polley was told that he had been rehired.

The Defendants argue further that the clause in the letter from Caster which made Polley's employment for 1975-76 "subject to re-assignment" by the Superintendent prevented Polley from holding a reasonable expectation of continued employment as principal. The evidence adduced at the Board hearing indicates, however, that while the School District occasionally reassigned its principals from one campus to another, those persons remained in an administrative capacity. If the School District had wanted to rehire Polley as a teacher, the Superintendent could very easily have so indicated by sending Polley the renewal letter which was sent to the School District teachers. Moreover, in this Court's view, the term "re-assignment" does not ordinarily

signify a sharp change in employment status or a salary reduction of several thousand dollars. Cf. Moore v. Otero, 557 F.2d 435 (5th Cir. 1977), where the reassignment of a police corporal to patrolman was held not to involve a protected property interest. There, the position of corporal was available to all patrolmen on the basis of merit, there was no fixed additional compensation for corporals, and the reassignment of the plaintiff was explicitly provided for in the police department regulations, and did not affect the officer's civil service status. That situation certainly is very different than the distinction in employment status between a school principal and a classroom teacher. The Court finds that Plaintiff had a property interest sufficient for Due Process protection.

Having determined that a protected

property interest existed, the Court must examine the record of the administrative proceedings to decide whether the School District afforded Polley an adequate hearing, and if so, whether the Board of Trustees' decision was supported by substantial evidence. Stapp v. Avoyelles Parish School Board, supra, at 534. Plaintiff does not now contend that he was denied procedural due process, though he points out that the Board had already voted to uphold the Superintendent's decision to demote Polley by secret vote in February, 1975. That alone would not invalidate the decision if it is founded on a substantial basis, since it is the duty of the Board to hold a hearing, even if it does so in the first instance subsequent to discharge. Stapp v. Avoyelles Parish School Board, supra.

In determining whether there is in

the record substantial evidence to support an administrative determination, this Court may not substitute its judgment for that of the agency. Evidence which is substantial need be only enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from the evidence is one of fact for the jury. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968). Under that narrow standard, and after a thorough review of the entire transcript, the Court is of the opinion that there was substantial evidence to support the Board of Trustees' decision to demote Robert Polley.

Several grounds for the removal from his position as principal were given to Polley prior to the hearing. The Court notes, in passing, that several of them concern matters which did not arise until

after the February meeting at which the Board admittedly voted to demote Polley. The grounds included: (1) dissatisfaction with Polley's handling of a gift of playground equipment to East LaVega Elementary School by the local Parent-Teacher Organization (PTO); (2) Polley's unilateral action in promoting the installation of glass doors at the school; (3) attendance problems with regard to the scheduling of speech therapy classes at the school; (4) failure to fill out and return a grant application for Title III funds; (5) excessive class loads in Title I remedial reading classes; and (6) failure to attend a principals' workshop.

Without reviewing the testimony and exhibits in detail, the Court notes that the evidence of Polley's shortcomings with regard to each of the above charges is far from strongly convincing. The record shows

Polley was widely liked and respected both as a teacher and an administrator, and in fact was rehired by the School District as a teacher. The testimony at the Board hearing indicates that the dissatisfaction with his performance as principal stemmed primarily from the Superintendent's disagreement with Polley over the construction priorities and scheduling system at the elementary school. Mr. Polley's testimony credibly refutes the allegations that he was deficient in remedying the speech therapy attendance problems; exhibits show that the teacher failed to keep attendance records on the forms furnished her, and no such records were shown to Polley to apprise him of any problem. His testimony also tends to show that he followed the effective guidelines relative to class size limits in the remedial reading program.

With regard to the principal's workshop, the only testimony as to the content indicates that it was more recreational than substantive, though Polley admitted that he did not follow the Superintendent's suggestion that he attend.

The Court feels compelled to make further comment on the charge that Polley was late in furnishing the application for Title III funds. There was testimony from Superintendent Caster and his Assistant, O. P. Adams, that Polley failed to perform the assignment he was given to make the initial application for funds for a bilingual program. In support of their testimony, they introduced Respondent's Exhibit No. 6, which is a letter purportedly written to Caster by Adams on January 20, 1975, detailing the problems in obtaining Polley's application. The conclusion is almost inescapable, however,

that the letter was written neither by Adams nor on January 20. The text of the letter refers several times to "Mr. Adams" in the third person, and refers specifically to January 20 in the past tense as "that date." Although the Court is hesitant to attribute conspiratorial motives to the parties involved, it certainly would appear to a reasonable reader that the letter was manufactured after the fact to bolster the allegations against Polley, and it is this Court's view that such evidence casts doubt on the credibility of the entire proceeding.

Nonetheless, viewing the transcript as a whole, the Court cannot conclude that the allegations and testimony against Polley were so wholly lacking in substance as to render the Board's action completely arbitrary. Even though as an original matter the Court might view the evidence

differently, considerable deference and leeway must be given to the local officials in making personnel decisions. As the Supreme Court of the United States has recently admonished:

> "We must accept the hard fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways."

Bishop v. Wood, supra, at 349-50.

Accordingly, it is

ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment be, and hereby is, DENIED, and that Defendants' Motion for Summary Judgment be, and hereby is, GRANTED.

Entered this 13th day of December, 1977, at Austin, Texas.

/s/ Jack Roberts
JACK ROBERTS
UNITED STATES DISTRICT JUDGE

APPENDIX B

LOCAL RULE 21 DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

NO. 78-1365

ROBERT O. POLLEY,
Plaintiff-Appellant,

versus

WILBURN E. KIRKLAND, ET AL.,
Defendants-Appellees.

Appeal from the United States District
Court for the Western District
of Texas

(DECEMBER 6, 1979)

Before COLEMAN, FRANK M. JOHNSON, JR. and
POLITZ, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule
21.[1]

---

[1] See N.L.R.B. v. Amalgamated Clothing
Workers of America, 5 Cir., 1970,
430 F.2d 966.

APPENDIX C

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

Amendment XIV, Sec. 1 of the Constitution of the United States which reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Civil Rights Act of 1871, Act of April 20, 1871, c. 22, Sec. 1, 17 Stat. 13, Title 42, U.S.C., Sec. 1983, which reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

> and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 28, U.S.C., Sec. 1343(3) and (4), which reads:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Title 28, U.S.C., Sec. 1331, which reads:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the

Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

Supreme Court, U. S.
FILED
APR 11 1980
MICHAEL RODAK, JR., CLERK

79-1271

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

* * *

ROBERT O. POLLEY,

Petitioner,

V.

WILBURN E. KIRKLAND, Et. al.,

Respondents,

* * *

BRIEF FOR THE RESPONDENTS, M.L. BROCKETTE AND THE STATE BOARD OF EDUCATION OF THE STATE OF TEXAS, IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER ROBERT O. POLLEY

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

* * *

NO. _____

* * *

ROBERT O. POLLEY,

Petitioner,

V.

WILBURN E. KIRKLAND, Et.al.,

Respondents,

* * *

BRIEF FOR THE RESPONDENTS, M.L. BROCKETTE AND THE STATE BOARD OF EDUCATION OF THE STATE OF TEXAS, IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER, ROBERT O. POLLEY

* * *

This is the brief filed on behalf of the Respondents, M.L. Brockette and The State Board of Education of the State of Texas, said brief being in opposition to the Application for Writ of Certiorari of Petitioner, Robert O. Polley.

OPINION

The Memorandum Opinion of the United States District Court, Western District of Texas, Austin Division and the local Rule 21 decision of the United States Court of Appeals for the Fifth Circuit, appear in the Appendix of Petitioner's Application for Writ of Certiorari, pages A1-A22.

JURISDICTION

Respondents have no objection to the jurisdictional basis alleged by Petitioner in his Application for Writ of Certiorari, pages 3-4.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and the statutes involved are fully set forth in Petitioner's Application for Writ of Certiorari, page 5.

QUESTION PRESENTED

Whether there was substantial evidence in the administrative record to support the decision of the La Vega Independent School District to demote Petitioner.

STATEMENT OF THE CASE

The statement of the case set out in Petitioner's Application for Writ of Certiorari and in the brief of Respondents filed by Mr. Herring, is exhaustive and will not be repeated.

ARGUMENT

This Honorable Court should affirm the ruling of the United States Court of Appeals for the Fifth Circuit and deny Petitioner's Application for Writ of Certiorari.

This case was structured in the District Court to fall within the mandate of the Fifth Circuit in *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). That case attempted to define the proper scope of review of academic employment controversies by a Federal District Court. In *Ferguson v. Thomas, supra*, the Fifth Circuit held, as it has consistently since, that where there is no question of a procedural deficiency and substantial evidence in the record supports the

personnel decision of the academic agency, the decision of that agency should be affirmed. This was the approach followed in the recent case of *Bowling v. Scott*, 587 F.2d 229 (5th Cir. 1979), cert. denied 100 S.Ct. 69 (1980), affirming the termination of a college professor in which the Court stated:

> "... our independent review of the record before the committee convinces us that the action taken was supported by substantial evidence."

While this Court has never explicitly endorsed the approach to academic employment cases adopted by the Fifth Circuit, that approach is consistent with rulings of this Court. This Court has held that, where an academic employee of the State has a property interest in his job, due process requires that before such an employee may be terminated or demoted, he must be granted a hearing in which he should be informed of the grounds for the action and afforded an opportunity to challenge their sufficiency. *Perry v. Sinderman*, 408 U.S. 593 (1972). It would appear to be a tremendous waste of energy for the State to provide a hearing if it could not then rely on substantial evidence in the record to make a decision to terminate or demote the employee. It would be duplicative of effort and an intrusion into academic affairs for a Federal District Court to then rehear that evidence in trial. Instead, the District Court, as it did in this case, should make an independent review of the record before the academic forum to determine if substantial evidence supports the decision to make the demotion and, upon finding that it does, affirm the decision. The approach followed by the District Court allows academic controversies to be resolved in a proper forum and avoids undue intrusion into the internal affairs of academic institutions by the Federal Courts.

Petitioner did not challenge in either Court below the procedures followed in the hearing afforded him by the Defendants. Rather, the case was submitted to the

District Court by both parties as a question of substantial evidence.

There was clearly substantial evidence in the record to support the decision of the La Vega Independent School District Board of Trustees to demote the Petitioner and to support the decision of the State Board of Education affirming the School District's decision. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to make a decision. *Consolidated Edison v. National Labor Relations Board*, 305 U.S. 197 (1938).

Mr. Robert Caster, Superintendent of La Vega Independent School District, was Petitioner's direct superior. He testified at the hearing before the La Vega Board of Trustees about several problems he had encountered in dealing with Petitioner, including the following:

(1) Petitioner had failed to attend extracurricular activities of the school district after being instructed to do so. (Board TR. p. 14).

(2) Petitioner failed to deliver teacher evaluation reports on a timely basis. (Board TR. pp. 15, 16).

(3) Petitioner would not cooperate with the Parent Teacher Organization's efforts to purchase playground equipment for Petitioner's school. (Board TR. pp. 16-20).

(4) Petitioner scheduled speech therapy classes at his school in such a way that it resulted in unusually high absentee rates from those classes. (Board TR. pp. 16-29).

(5) Petitioner failed to timely complete applications for Federal funds for his campus. (Board TR. pp. 29-33).

(6) Petitioner was slow in correcting overcrowding in remedial reading classes, which overcrowding violated Federal regulations and threatened the loss of Federal funds. (Board TR. pp. 33-37).

(7) Petitioner failed to attend professional workshops and seminars. (Board TR. pp. 38-40).

The testimony of Mr. Caster regarding the Petitioner's professional inadequacies clearly constitutes substantial evidence supporting the La Vega Board of Trustee's decision to demote him. That has been the opinion of the Commissioner of Education of the State of Texas, the State Board of Education, the United States District Court and the United States Court of Appeals for the Fifth Circuit. Since there was substantial evidence supporting the school district's decision, the Court of Appeals correctly affirmed the summary judgment in favor of Respondents granted by the District Court.

CONCLUSION

The Application for Writ of Certiorari of Petitioner, Robert O. Polley, should be denied.

Respectfully submitted,

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Attorneys For Respondents, M.L. Brockette, and The State Board of Education of the State of Texas

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that three copies of the foregoing Brief for the Respondents, M.L. Brockette and the State Board of Education of the State of Texas, in Opposition to the Application for Writ of Certiorari of Petitioner, Robert O. Polley, were mailed, postage prepaid, to TONY E. DUTY, Attorney at Law, 2309 Austin Avenue, Waco, Texas 76701, attorney for the Petitioner on this the _____ day of April, 1980. I further certify that all parties required to be served have been served.

LONNY F. ZWIENER

Supreme Court, U. S.
FILED
MAR 19 1980
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

No. 79-1271

ROBERT O. POLLEY,

Petitioner,

vs.

WILBURN E. KIRKLAND, W. C. LONG, COY L. EMERT, GERALD PETTY, DONALD W. HUDSON, GARRY HARRIS and CONRAD ROBINSON, Individually and as Members of the Board of Trustees of the La Vega Independent School District, ROBERT W. CASTER, Individually and as Superintendent of the La Vega Independent School District, M. L. BROCKETTE, Individually and as Commissioner of the Board of Education of the State of Texas and THE STATE BOARD OF EDUCATION OF THE STATE OF TEXAS,

Respondents,

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER, ROBERT O. POLLEY

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In the

Supreme Court of the United States

No. .....

ROBERT O. POLLEY,

Petitioner,

vs.

WILBURN E. KIRKLAND, W. C. LONG, COY L. EMERT, GERALD PETTY, DONALD W. HUDSON, GARRY HARRIS and CONRAD ROBINSON, Individually and as Members of the Board of Trustees of the La Vega Independent School District, ROBERT W. CASTER, Individually and as Superintendent of the La Vega Independent School District, M. L. BROCKETTE, Individually and as Commissioner of the Board of Education of the State of Texas and THE STATE BOARD OF EDUCATION OF THE STATE OF TEXAS,

Respondents,

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER, ROBERT O. POLLEY

This is the brief filed on behalf of the Respondents Wilburn E. Kirkland, W. C. Long, Coy L. Emert, Gerald Petty, Donald W. Hudson, Garry Harris and Conrad Robinson, individually and as members of the Board of Trustees of the La Vega Independent School District, Robert W. Caster, individually and as Superintendent of the La Vega Independent School District, said brief being in opposition to the Application for Writ of Certiorari of Petitioner, Robert O. Polley.

OPINION

The memorandum opinion of the United States District Court, Western District of Texas, Austin Division, and the local Rule 21 decision of the United States Court of Appeals for the Fifth Circuit, appears in the appendix to Petitioner's Application for Writ of Certiorari, pages A1-A22.

JURISDICTION

Respondents herein have no objection to the ground upon which the jurisdiction of this Court is invoked as same is alleged in the Petitioner's Application for Writ of Certiorari (pp 3-4).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitutional Provisions and the Statutes involved are fully set forth in Petitioner's Brief (p 5).

QUESTIONS PRESENTED

1. Whether the District Court erred in granting the Motion for Summary Judgment for Respondents herein based on substantial evidence in the administrative hearings from which appeal was made.

2. Whether the majority ruling by this Court in the case of Bishop v. Wood, 426 U.S. 341 (1976), should be overturned or limited.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct and will not be repeated here; however, in support of the Respondents' position it is necessary that some omitted facts be brought to the attention of the Court. For purposes

of clarity it is pointed out at this juncture that the record in this case consists of two transcripts, the first transcript being that taken before the Board of Trustees of the La Vega Independent School District and the second being that taken before the State Commissioner of Education. References to the transcript of the hearing before the Board of Trustees of the La Vega Independent School District will be designated "Board TR." followed by the page number in the original transcript, with exhibits referred to as "Board TR.-Polley Ex." or "Board TR.-School Ex." followed by the number of the particular exhibit in question. References to the transcript or the hearing before the State Commissioner of Education will be designated "Comm. Ed. TR." followed by the page number in the original transcript with exhibits referred to as "Comm. Ed. TR.-Polley Ex." or "Comm. Ed. TR.-School Ex." followed by the number of the particular exhibit in question. All of these references will be preceded by the letter R. in order to designate a reference to the record. All references to the Petitioner's appendix, which is included in the Petitioner's Application for Writ of Certiorari will be referred to as "Pet. Ap." followed by the number of the particular page or pages to which reference is made. It is further pointed out in this regard that the transcript of both hearings referred to above were before the district court as stipulated by the parties for the reason that in order to shorten the hearing before the Commissioner of Education, the statement of facts and exhibits of the Board of Trustees herein were introduced in toto and accepted in evidence by agreement of the parties at the hearing before the Commissioner of Education. (R. Comm. Ed. TR. pp 10-11)

Prior to Petitioner's reassignment, which is made the basis of this suit, the Petitioner had served in the capacity

of principal of East La Vega Elementary School for three years. This reassignment became effective upon the expiration date of a two year contract which began on August 1, 1973, and terminated at the end of June, 1975. (R. Board TR.-School Ex. 3 and R. Comm. Ed. TR. p 78) The Petitioner was not reassigned nor was he demoted during the contract period nor was he dismissed during the contract period or at the end of the contract period. The Petitioner was offered a new one-year contract as a classroom teacher (R. Board TR. pp 11-12) which he accepted (R. Comm. Ed. TR. p 80). At the time that the Petitioner learned that the reassignment referred to above was to a position of a classroom teacher rather than that of principal, he did, in fact, demand a hearing before the Board of Trustees of the La Vega Independent School District to determine why he was being reassigned and was not being reelected to the position of principal. The Board of Trustees granted the hearing and after a full hearing the Board voted to affirm the decision not to give a contract to the Petitioner as a principal but to give him a contract as a classroom teacher. Prior to the hearing referred to above the Petitioner was informed explicitly of the various allegations against him and of the charges that would be presented at his hearing. (R. Board TR.-School Ex. 5) (Pet. Brief pp 10-11) (Pet. Appendix p A16) At the hearing referred to above the Superintendent of the La Vega Independent School District, Robert W. Caster, one of the Respondents herein, testified in length as to his recommendation to the Board of Trustees for the district that the Petitioner not be re-elected as principal for the East La Vega Elementary School for the school year 1975-76, and in so doing explicitly stated his reasons for his recommendation in the change of assignment and fully explained why, in his opinion, he did not believe the Petitioner was performing his job as principal in an effective

and efficient manner. There were many areas in which his dissatisfaction with the performance of the duties required of the Petitioner were explained (R. Board TR. pp 13-40). Other testimony offered at the hearing consists of the testimony of Mr. O. P. Adams, the Assistant Superintendent of the District. Mr. Adams also stated that he concurred with the decision to reassign the Petitioner from principal to classroom teacher as being in the best interest of the school system. (R. Board TR. pp 98-99) He further testified that he wrote the letter of January 20, 1975, (R. Board TR.-school ex. 6) and the reasons for writing the same (R. Board TR. pp 90-93). In view of this testimony, this writer cannot concur with the conclusion reached by the District Court in the Court's memorandum opinion of December 13, 1977, excerpts of which are printed on page 12 of Petitioner's Brief and which is also printed in the appendix to Petitioner's Brief beginning with the second paragraph on page A18 and continuing through the entire first paragraph on page A19. Respondents specifically disagree with that portion of the memorandum opinion set out above wherein it is stated that it would "appear to a reasonable reader that the letter was manufactured after the fact . . ." which "cast doubt on the credibility of the entire proceedings." Obviously, the writer of the opinion has not met or come in contact with anyone who habitually refers to himself in the third person. There are very few who do so but there are some people who do. Even though the District Court was critical, it recognized the law that it could not substitute its findings for those of the administrative agency and that there was substantial evidence in the record to support the decision of the agency. The District Court had before it the issue as to whether or not the Petitioner herein had received procedural due process. In attempting

to resolve this problem the Court pointed out in its opinion that:

> "The Commissioner of Education found, and the record adequately supports the finding, that the La Vega Independent School District had not adopted the statutory 'continuing contract' method of tenure which would have entitled Polley to procedural protections set forth in Chapter 13, sub-chapter C, of the Texas Education Code (1972)." (A-Pet. App. p A9)

The Court, after having set out the above, went on to say that due to the letter that had been received by the Petitioner that this did, in fact, create a non-subjective expectancy of continued employment and would therefore entitle the Petitioner herein to procedural due process, however, in making this observation the Court further observed and pointed out that the Petitioner herein did not, at the time of said hearing nor had he ever contended that he had been denied procedural due process as required by law, and more particularly by the 14th Amendment to the Constitution of the United States. The Court, in making this finding, set out the following:

> "Plaintiff does not now contend that he was denied procedural due process though he points out that the Board had already voted to uphold the Superintendent's decision to demote Polley by secret vote in February, 1975. That alone would not invalidate the decision if it is founded on a substantial basis, since it is the duty of the Board to hold a hearing, even if it does so in the first incident subsequent to discharge." (A-Pet. App. p A14)

The Court, after having dealt with the procedural due process question then approached the question of whether or not there was substantial evidence to support the ad-

ministrative determination that had been previously made by both the Board of Trustees of the La Vega Independent School District and by the Commission of Education and the State Board of Education. In so doing the Court pointed out in its opinion that the case had been submitted by both parties under the agreement that the substantial evidence rule did, in fact, apply. In arriving at the determination that there was, in fact, substantial evidence to justify the decision of the administrative agencies as set out above, the Court wrote the following:

> "In determining whether there is in the records substantial evidence to support an administrative determination, this Court may not substitute its judgment for that of the agency. Evidence which is substantial need be only enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from the evidence is one of fact for the jury. Watson v. Gulf Stevedore Corp., 400 F. 2d 649 (5th Cir. 1968). Under that narrow standard and after a thorough review of the entire transcript, the Court is of the opinion that there was substantial evidence to support the Board of Trustee's decision to demote Robert Polley." (A-Pet. App. pp A14-A15)

The Court, after having made the above statement, went on to discuss various items of evidence that had been adduced at both the hearing before the Board of Trustees and at the hearing before the Commissioner of Education, and after having discussed these items concluded its opinion as follows:

> "Nonetheless, viewing of the transcript as a whole, the Court cannot conclude that the allegations and testimony against Polley were so wholly lacking in substance as to render the Board's action completely arbitrary. Even though as an original matter the Court

might view the evidence differently, considerable deferance and leeway must be given to the local officials in making personnel decisions." (A-Pet. App. pp A-19-A20)

The Court went on to quote verbatim from the decision handed down by the United States Supreme Court in Bishop v. Wood, 426 U.S. 341 (1976), wherein the Supreme Court set out the following:

> "We must accept the hard fact that numerous individual mistakes are inevitable in the da to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must premuse that official action was regular and, if erroneous, can best be corrected in other ways." (A-Pet. App. p A20)

ARGUMENT

The Federal District Court's ruling of December 13, 1977, and the ruling of the United States Court of Appeals for the Fifth Circuit handed down on December 6, 1979, are correct and should be affirmed by this Court. The premise set forth in the brief of the Petitioner is that this Court should overturn the majority opinion of the United States Supreme Court handed down in *Bishop v. Wood*, 426 U.S. 341 (1976), however, this writer would point out at this juncture that there is much more involved than just *Bishop v. Wood*, supra, and to consider the case at bar only in light of *Bishop v. Wood*, supra, would be somewhat misleading. Several well established principals of law and a long line of opinions would have to be totally disregarded in order to accomplish the end result which Petitioner is seeking.

First, the Petitioner alludes in his brief to due process. It is the Respondents' contention, which is adequately supported by both the transcripts of the prior hearings and the opinion handed down by the District Court and the United States Court of Appeals for the Fifth Circuit, that the due process guarantees of the 14th Amendment and the Federal Law as well as the State Law were met to their fullest.

In this regard it is pointed out that at the April meeting of the school board, when the Petitioner appeared and requested at that public meeting that the charges and accusations against him be made public, he did not have an attorney with him nor was he at that time represented by an attorney. (R-Board TR. p 81) In view of these facts the Superintendent and the Board, upon the advice of their counsel, refused to go into a hearing process with the Petitioner at that time. (R-Board TR. p 42) This was in keeping with the decision handed down by the Supreme Court in the case of *Board of Regents v. Roth*, 408 U.S. 546, S. Ct. 2701, and also in keeping with the Supreme Court's decision in *Perry v. Sindermann*, 1972, 408 U.S. 593, 92 S. Ct. 2694, and also in view of the decision of the Court of Civil Appeals for the State of Texas in the case of *Hix v. Tuloso-Midway Independent School District*, 489 S.W. 2d 706 1973, wherein the Court in all three cases mentioned above established the general principal that if a person is going to be reassigned, demoted, dismissed, or has his contract period altered in any way, that even though under the existing laws of the state or of the federal government that he may not be entitled to a hearing by virtue of said law, but that, if accusations, allegations, or any statements are made to him that would in any way damage his reputation or character in the community or tend to impose a stigma upon his personality that would foreclose or hinder him from seeking or obtaining other gainful employment that that person

would be automatically entitled to a hearing to refute any accusation, claim, or charge that would tend to discredit him in any manner as set out above. Shortly after this April meeting mentioned above the Petitioner herein did retain an attorney to represent him in this action. The attorney, in accordance with the laws of the state, contacted the Superintendent of Schools and this attorney in writing and requested a hearing for and on behalf of Petitioner. That even though the Board of Trustees was of the opinion that Petitioner herein was not entitled to a hearing, they did grant him this right in order to insure that he be given every right guaranteed him by the Constitution of the United States. That, shortly thereafter, a letter was sent to the Petitioner and his attorney setting forth in detail all charges and accusations against him and setting a definite time, date and place for a public hearing. In accordance with the terms and conditions of the prescribed guidelines for the hearing, a hearing was held in the administrative building of the La Vega Independent School District and at said hearing Mr. Polley was represented by an attorney and had every procedural due process guarantee afforded him that was available under the Constitution or the laws of the State of Texas. This hearing was quite extensive as evidenced by the length of the transcript on file herein, and the hearing was held before the Board of Trustees, *without* (emphasis added) objection from Petitioner or his attorney, and after Petitioner's counsel had had ample opportunity, and after having, in fact, examined the tribunal by questioning as to whether or not they had already made up their minds on the matter. (R.-Board TR. p 9) Then, upon appeal, Petitioner questions the fairness of said forum. That, within the time prescribed by the law, the Petitioner herein, after having received an adverse finding from the Board of Trustees of the La Vega Independent School District, exercised his further right by appealing to the Commissioner of Education for the State of Texas. That hearing was held under guidelines and as prescribed by law and at that hearing the Petitioner herein was afforded the additional opportunity of being confronted with witnesses, being able to present witnesses in his own behalf, and testifying in his own behalf, all of which he took advantage of. This proceeding, like the first before the Board of Trustees of the La Vega Independent School District, was transcribed and the record is before this Court for examination. The Petitioner, after receiving an adverse finding before the Commissioner of Education, then exercised his next process of administrative review and appealed the decision of the Commissioner of Education to the State Board of Education wherein, as in the first instance, his attorney was present, and the case was presented before the State Board of Education. The outcome of this hearing was adverse to Petitioner herein and he exercised his further right of judicial review by appealing to the Federal District Court, and, after an adverse finding at that stage of the proceeding, appealed to the United States Court of Appeals for the Fifth Circuit and from an adverse finding at the Court of Appeals, applies for an Application for Writ of Certiorari to this Court. These facts are pointed out to reiterate the fact that the Petitioner herein has received in all things the utmost in procedural due process safeguards. These steps have been approved by the Courts in several cases, including the case of *Skidmore v. Shamrock Independent School District*, 464 Fed. 2d 605, 1972, and also by the case of *Lowrance v. Barker*, et al, 347 Fed. sup. 588, 1972. The above facts taken in conjunction with the findings of the District Court, that:

> "Plaintiff does not now contend that he was denied procedural due process, though he points out that the Board had already voted to uphold the Superintendent's

> decision to demote Polley by secret vote in February, 1975. That alone would not invalidate the decision if it is founded on a substantial basis, since it is the duty of the Board to hold a hearing, even if it does so in the first instance subsequent to discharge. *Stapp v. Avoyelles Parish School Board*, supra."

eliminate any possible basis for finding that Petitioner was in any way denied due process.

It is uncontroverted in this case that the substantial evidence rule applies and this agreement is further substantiated by the United States Court of Appeals, Fifth Circuit, in their opinion in the case of *Stapp v. Avoyelles Parish School Board*, (1977) 545 F. 2d 527, 534, 535, wherein the Court said:

> "Ordinarily the District Court is not expected to conduct a de novo hearing. Rather, the first inquiry is to examine the record of a school board's hearing to ascertain whether the procedures followed violated federal rights. In other words, did the school board conduct a hearing for the principal adequate by the procedural due process requirements of the 14th Amendment? If so, then the record should be viewed to determine whether substantial evidence before the agencies support the action."

The Respondents herein would further site the case of *The City of San Antonio v. Texas Water Commission*, 407 S.W. 2d 762, 756 (1966) wherein the Texas Supreme Court stated:

> ". . . Under the substantial evidence rule the issue to be decided and on which evidence is to be heard is the reasonableness of the commissioner's order; this is a question of law and an appellant court cannot render its decision based upon facts found by a trial court

> because the legal test of the reasonableness of the order of the commission is whether it is reasonably supported by substantial evidence and not whether it is supported by a preponderance of the evidence. Furthermore, trial of fact issues by a Judge or Jury is avoided; it is the commissioner's fact finding that is before the trial and appellant courts . . . as was stated in *Gulf Land Company v. Atlantic Refining Company*, 134 Tex. 59, 74, 131 S.W. 2d 73, 82 (1939);" . . . the Court does not act as administrative body to determine whether or not it would have reached the same fact conclusion that the commission reached, but will consider only whether the action of the commission in its determination of the facts is reasonably supported by substantial evidence."

This writer would further cite in support of Respondents' contention the case of *Duke v. North Texas State University*, 469 F. 2d 869 (1973), wherein the Court, after having stated the facts of the case, reversed the Federal District Court which had entered a preliminary injunction ordering the school to reinstate Mrs. Duke as a teaching assistant, and pointed out in their opinion that Mrs. Duke received procedural due process even though certain members of the president's cabinet were also members of the board, and further stating the fact that there was no evidence of partiality presented. In so doing the Court quoted from the case of *Ferguson v. Thomas*, Fifth Cir., 1970, 430 F. 2d 852:

> "If no federal right has been violated in the procedures followed, then the Court should next look to the record as developed before the academic agency to determine whether there was substantial evidence before the agency to support the action taken, with due care taken to judge the constitutionality of the school's action on the basis of the facts that were before the agency, and on the logic applied by it."

The Court went on to point out that the First Amendment rights must be applied in light of the special circumstances of the environment:

> "To effectuate balance of competing interests, fact findings by academic agencies when reached by correct procedures and supported by substantial evidence, are entitled to great weight, and the Court should never lightly substitute its judgments for that of the board."

This Court went on to cite the case of *Esteban v. Central Missouri State College*, 8th Cir. (1969) 415 F. 2d 1099, 1090, wherein the Eighth Circuit Court of Appeals wrote the following:

> "Courts are not equipped by either training or experience to select individually the faculty and staff for colleges and universities, and to enjoin a university to hire or re-hire a member of its faculty goes beyond mere redress of constitutional rights of an individual. We should interfere only where there is a clear case of constitutional infringement."

To this writer it seems readily apparent from the cases cited above and from that portion of the district court's decision in the case at bar wherein the Court wrote:

> "The Court is of the opinion that there was substantial evidence to support the Board of Trustees' decision to demote Robert Polley."

that this Court should in all things affirm the judgment of the district court, the United States Court of Appeals for the Fifth Circuit, and in so doing adhere to the rules set forth by this Court in *Bishop v. Wood*, supra.

CONCLUSION

The Application for Writ of Certiorari of Petitioner, Robert O. Polley, should be denied.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of March, 1980, 3 copies of the foregoing brief for Respondents were mailed, postage prepaid, to Tony E. Duty, Attorney at Law, 2309 Austin Avenue, Waco, Texas 76701, attorney for Petitioner. I further certify that all parties required to be served have been served.

Tommy P. Herring